SUPREME COURT, U. S.

FILED

NOV 10 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 158

CHARLES E. SULTON AND MICHELLE SULTON, HIS WIFE,

Petitioners,

v.

FRANK R. SCHOEN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ELSBETH LEVY BOTHE,
300 Maryland Trust Building,
Baltimore, Maryland 21202,

RONALD A. WILLONER,
7100 Baltimore Avenue,
College Park, Maryland 20740,

Attorneys for Respondents.

The Daily Record Co., Baltimore, Md. 21203

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On the direction of the Court,[1] the respondents respond to the Petition for Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit remanding the civil suit brought by the respondents against

[1] By letter dated October 10, 1969 from the Clerk of the Court to counsel for the respondents. Respondents have throughout taken the position that they oppose removal only to the extent that it delays or prevents hearing on the merits by a court having jurisdiction to grant appropriate relief.

the petitioners to the Circuit Court for Prince George's County, Maryland.

OPINIONS BELOW

The Opinions below are set forth in the Appendix to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

Respondents concur with Petitioners' statement of jurisdiction.

QUESTIONS PRESENTED

1. Is the defendant in a State court civil suit, who makes no claim that he is denied or cannot enforce his rights in the state courts, entitled to an evidentiary hearing on the substantive merits, on a removal petition claiming that the suit is violative of rights protected by federal civil rights legislation?

2. Is the suit here sought to be removed prohibited by the provisions of 42 U.S.C. §3617 (§817 of the Fair Housing Act of 1968)?

STATUTES INVOLVED

The statutes involved are set out under that heading in the Petition.

STATEMENT OF THE CASE

The petitioners are a Negro husband and his caucasian wife and the respondents are among their neighbors in the community known as "Captain's Cove" in Oxon Hill, Prince George's County, Maryland. In their Petition and previous pleadings, the petitioners state that the community is "otherwise all white." There is no evidence of the racial makeup of the community. Respondents maintain that the

fact is irrelevant, but that there are or have been other non-caucasian homeowners in "Captain's Cove".

On September 13, 1968, the respondents brought the suit described in petitioners' statement of the case, asking for an injunction and money damages on account of certain acts of nuisance allegedly committed by the petitioners in their relationship as neighbors of the respondents. The suit was set for hearing on the injunction in the Circuit Court for Prince George's County, Maryland on October 4, 1968. On September 27, 1968, the petitioners removed the suit to the United States District Court for the District of Maryland on a petition claiming that the respondents had committed various acts of nuisance against *them*[2] which along with the bringing of the suit constituted an attempt to "coerce, intimidate, threaten and interfere with Petitioners in their exercise and enjoyment of, and on account of their having exercised and enjoyed rights granted or protected by Title VIII of the Civil Rights Act of 1968." On the same allegations, the Petitioners filed a counter-claim for money damages (but not injunctive relief) in the District Court.

As required by 28 U.S.C. §1446(e), the state court proceedings were stayed by the bringing of the removal action and the petitioners have since, through the filing of appeals from the remands described in their petition, and the obtention of intervening stays[3] averted any judicial determination on the merits of either side.

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[2] Among petitioners' claimed grievances was that the respondents caused their home "to be buzzed by helicopter" (R. 56). Petitioners' other contentions are set out in their statement of the case (pp. 4-5) as established facts, although the claims of both sides remain mere allegations impassed in limbo pending resolution of the removal proceedings.

[3] Petitioners obtained a stay from United States Circuit Judge Boreman pending filing of their Petition to this Court, and from Chief Justice Warren pending the action of this Court on their Petition.

ARGUMENT

THE ISSUES ARE SETTLED BY THE DECISIONS OF THIS COURT WHICH HAVE BEEN CORRECTLY APPLIED BY THE APPELLATE COURT AND THE COURTS OF OTHER CIRCUITS.

The landmark companion cases of *Georgia v. Rachel*, 384 U.S. 780, and *Greenwood v. Peacock*, 384 U.S. 808 (1966) fully discuss and carefully delineate the narrow area in which removal of alleged civil rights prosecutions[4] may be allowed. Its limits comprise the circumstances in which the petitioner is being prosecuted for "activity which is *expressly* protected by a law providing for equal civil rights stated in terms of racial equality," that is, where the law "substitutes a right for a crime."

In *Rachel* where the petitioners claimed to be prosecuted for trespass attendant upon efforts to use facilities covered by Title II of the Civil Rights Act of 1964, this Court found no need to determine whether those petitioners would be denied or unable to enforce their civil rights in the State courts. Entertainment of the prosecution was in and of itself a denial by the State courts of rights protected by the statute.

This Court's opinion in *Peacock* is applicable to the great majority of cases including the instant one, where there is no direct nexus between the prosecution and the protected activity.

The respondents would rest their argument on the well reasoned opinion of Judge Friendly speaking for the Second

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[4] The respondents here refer to either criminal or civil proceedings, and concede as they must from the plain wording of 28 U.S.C. §1443(1) that the statute is applicable to both. However, the *Rachel-Peacock* rationale that the prosecution must be based upon a law of general application from which it can be "clearly predicted," that the petitioner will be unable to enforce or be denied his rights by the state courts would seem to require a different approach to civil cases in which the State is not a litigant.

Circuit in *New York v. Davis*, 411 F. 2d 750 (believed to be the only other removal proceedings under the Fair Housing Act of 1964 which have yet been considered by an appellate court).

Davis sought to remove a New York prosecution for "menacing," claiming that he was innocent and being prosecuted in retaliation for his attempts to move his interracial family into a white neighborhood. As do the instant petitioners, Davis contended that his prosecution came within the *Rachel* confines because it was brought in violation of 42 U.S.C. §3617. Remanding the case without an evidentiary hearing, Judge Friendly reasoned that:

(1) The Fair Housing Act confers no right to menace while the Public Accommodations Act invoked in *Rachel* does confer a right to trespass in places of public accommodation.

(2) Under the *Peacock* doctrine it is not enough to show that the charges are false and intended to discourage petitioner from exercising a federal right.

(3) An evidentiary hearing is only justified to determine whether the conduct charged is within an area withdrawn by federal statute from the ambit of allowable state prosecution, and not for the purpose of determining the subject of the charge.

There is no conflict between the Circuits, which have observed and carefully applied the *Rachel-Peacock* delineation. The Fifth Circuit cases cited by Petitioners (*Walker v. Georgia*, 405 F. 2d 1195; *Wyche v. Louisiana*, 394 F. 2d 927; *Achtenberg v. Mississippi*, 393 F. 2d 478) all involve prosecutions which were claimed to be equivalent to prosecution for trespassing in a place of public accommodation — the one situation excepted by *Rachel*. The Fifth Circuit has never undertaken to overrule *Orange v. Alabama*, 386 F. 2d 829 in which that court remanded a prosecution for

"contributing to the delinquency of minors," despite petitioner's claim that the prosecution was for purposes of interfering with rights protected by the Voting Rights Act.

II.

THE SUIT HERE SOUGHT TO BE REMOVED IS NOT PROTECTED BY THE FAIR HOUSING ACT OF 1968.

The courts below assumed without deciding that the Fair Housing Act protects the quiet enjoyment of fair housing rights. Petitioners suggest (footnotes 1 and 2) that this issue can be held in abeyance. Respondents submit that the law on which petitioners ground their right to removal is so clearly inapplicable to the factual situation alleged, that the case can be remanded to the state courts for this reason without further inquiry.

42 U.S.C. §3617 on which the removal is founded makes it unlawful to interfere with any person in the exercise or enjoyment of rights granted or protected by §3603, §3604, §3605, §3606 of the Act. The protected area is sale or rental of housing (§3604), financing of housing (§3605) and brokerage services (§3606).

The removal petition shows on its face that the petitioners are in fact enjoying the rights expressly protected by the Fair Housing Act, that they are purchasing a home in an integrated community which was brokered, sold and financed without discrimination.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for certiorari should be denied.

Respectfully submitted,

ELSBETH LEVY BOTHE,
RONALD A. WILLONER,
Attorneys for Respondents.